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Supreme Court, U.S.
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No. 02-1848

In The
Supreme Court of the United States

FRANKLIN P. KOTTSCHADE
Petitioner,

v.

CITY OF ROCHESTER
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus curiae will address the following issues presented for review:

1. Is the rule of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (requiring that a just compensation case be litigated in state court before the federal court has jurisdiction to hear it), still valid in light of the subsequently developed law of regulatory takings, *see, e.g.*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 303 (1987)?

2. Does *Williamson County* irreconcilably conflict with the existing law of issue preclusion?

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Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode*

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae*

Island, 533 U.S. 606 (2001); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

STATEMENT OF THE CASE

Franklin P. Kottschade, a developer in the city of Rochester, Minnesota, acquired a 16.4-acre parcel of land there in 1992 on which he planned to develop a townhouse project. The City finally issued him a permit in 2000, after it rejected four of his development proposals. The City attached conditions to the permit that made the townhouse

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contributed financially to the preparation of this brief.

project economically unfeasible. These conditions included a drastic reduction in the number of homes (from 104 to 26) and an added per-unit development cost of $70,000.

Mr. Kottschade sued the City in federal district court under 42 U.S.C. § 1983, alleging a regulatory taking of private property requiring just compensation under the Fifth Amendment.[2] The district court and the Eighth Circuit both dismissed the claim as unripe per *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which requires Mr. Kottschade to first seek redress for the alleged federal constitutional violation in state court before seeking relief in federal court.

Mr. Kottschade brought this petition to request that this Court square this requirement with its decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), in which the Court held that a municipal

[2] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

government sued for a regulatory taking in state court could remove the case to federal court on the grounds that the action was a federal question over which federal district courts had original jurisdiction.

REASONS FOR GRANTING THE PETITION

I. The Rule of *Williamson County* Appears to Conflict With Subsequently Decided Regulatory Taking Cases, *e.g., First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 303 (1987), Holding That the Right to Just Compensation Arises Immediately Upon the Owner's Deprivation of Property By the Government

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), was decided two terms before this Court set forth the rule that a state must provide a just compensation remedy for regulatory takings, *see First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 303, 321 (1987), at a time when the existence of that constitutional right was in doubt.

See Williamson County, 473 U.S. at 203 n.4 (Stevens, J. concurring) ("The fact that a jurist as eminent as Oliver Wendell Holmes characterized a regulation that 'goes too far' as a 'taking' does not mean that such a regulation may never be canceled and must always give rise to a right to compensation"). The dimensions and qualities of this right have subsequently been expounded in a long line of cases. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). The time has come for this Court to re-examine *Williamson County* in light of this developed regulatory takings jurisprudence.

In *First English*, this Court held that a state's refusal to afford a just compensation remedy for private property taken for public use violated the Fifth Amendment's self-

executing guarantee. *See First English*, 482 U.S. at 315 ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation . . .'") (citing *United States* v. *Clarke*, 445 U.S. 253, 257 (1980); *Jacobs v. United States*, 290 U.S. 13, 16 (1933)). In so doing, this Court specifically rejected the suggestion that this damages remedy was dependent on statute: "The cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.'" *See First English,* 482 U.S. at 316 n.9.

In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), this Court further described the nature of the just compensation remedy: "When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution." *Del Monte*

Dunes, 526 U.S. at 717 (citations omitted). This rule has been recently reaffirmed by this Court. *See, e.g., Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

The rule of *Williamson County*--that the taking has not occurred until *after* the property owner has sued for just compensation in state court and lost would appear to be irreconcilable with the holding that the right to just compensation arises at the time the property owner is deprived of his property. *See Del Monte Dunes,* 526 U.S. at 717 ("Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation" (citing *First English*, 482 U.S. at 315; *Jacobs*, 290 U.S. at 16)). Paradoxically, the state suit that *Williamson County* requires the owner to file must allege

an uncompensated taking of private property without payment of just compensation--precisely the Fifth Amendment violation that *Williamson County* holds not to have yet occurred.

The paradox deepens with this Court's decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), holding that the defendant in the very type of state suit required by *Williamson County* has the right to remove the case to federal court because a federal question is present. *See International College of Surgeons*, 522 U.S. at 164 ("ICS's federal constitutional claims [which included a Just Compensation claim], which turn exclusively on federal law, unquestionably fit within this rule" conferring original jurisdiction on federal courts permitting the removal at issue).

Accordingly, this Court should grant certiorari to review whether *Williamson County* remains viable in the face of the developing law of regulatory takings.

II. *Williamson County*'s Requirement of Two Consecutive Suits for Just Compensation Appears Inconsistent with Doctrines of Claim and Issue Preclusion and the Rooker-Feldman Doctrine

Williamson County establishes a unique procedure, applicable only to Just Compensation claims against state actors, which requires two virtually identical but consecutive lawsuits--the first in state court to seek just compensation, the second (if necessary) in federal court to seek the same relief. Doctrines of issue preclusion, as well as the jurisdictional limitations of the *Rooker-Feldman* doctrine, however, prohibit re-litigation of the state court's decision in federal court. *Williamson County* thus creates a Catch 22: the federal court has no jurisdiction until the state court suit is completed, but completion of the state court suit precludes re-litigation in federal court. In practical effect, then, under *Williamson County* there is no federal court remedy for regulatory takings.

Long-established rules of claim and issue preclusion bar the relitigation of claims or issues in federal court once a

state court decides them. These doctrines are a "fundamental rule of law that serve an important public interest by ensuring a decisive end to litigation." *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 131.12[1] (Matthew Bender 2003) (citing *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1979) ("The doctrine of *res judicata* serves vital public interests . . . This Court has long recognized that '[public] policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties . . . '")).

The application of these principles means that a Just Compensation case, once litigated in state court, cannot be re-litigated in federal court. *See, e.g., Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment*, 1999 U.S. App. LEXIS 6396 (6th Cir. 1999) (affirming district court's dismissal of Just Compensation claim adjudicated in state court based on *res judicata*); *Front Royal and Warren*

County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998); *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (affirming district court's dismissal of a Just Compensation claim adjudicated in state court based on issue preclusion); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319 (10th Cir. 1998); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989). *See also* John J. Delaney and Duane Desiderio, *Who Will Clean Up The "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195, 203 (1999) ("property owners received no resolution of their taking claims in 83 percent of [federal] District Cases [from 1990-1998]").

Moreover the *Rooker-Feldman* doctrine, which holds that a federal court has no jurisdiction to act as an appellate

court over state court Just Compensation judgments,[3] also deprives the *Williamson County* state court litigant of a just compensation remedy. *See, e.g., Wilkinson,* 142 F.3d at 1324-25 (*Williamson County* ripeness requirement in a federal Just Compensation claim is insufficient to preclude application of *res judicata* and collateral estoppel principles, and *Rooker-Feldman* doctrine precludes federal courts from reviewing state court judgments); *Gash Assoc. v. Village of Rosemount*, 995 F.2d 726, 728-29 (7th Cir. 1993) (under *Rooker-Feldman*, federal Just Compensation plaintiffs cannot file collateral attacks on state court's civil judgments in federal district court, but instead must seek review in the Supreme Court); *Adams Outdoor Advertising v. City of East Lansing,* 2001 U.S. Dist. LEXIS 5549, *12-15 (W.D. Mich.

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[3] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414 (1923) ("This is a bill in equity to have a judgment of a circuit court in Indiana, which was affirmed by the Supreme Court of the state, declared null and void."); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) ("[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this Court. Therefore, to the extent that Hickey and Feldman sought review in District Court of the District of

2001) (granting summary judgment to municipal Just Compensation defendant based on *Rooker-Feldman* doctrine); *Community Treatment Centers, Inc. v. City of Westland*, 970 F. Supp. 1197, 1212-1220 (E.D. Mich. 1997).

Some federal courts have come to the opposite conclusion, creating further consternation among property owner litigants. *See, e.g., Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000); *Gulla v North Straba Township,* 146 F.3d 168 (3rd Cir. 1998); *Centres, Inc. v. Town of Brookfield,* 148 F.3d 699, 703 (7th Cir. 1998) (rejecting *Rooker-Feldman* doctrine in a case alleging inverse condemnation); *Gooden v. Faulkner County Sheriff's Dep't*, No. 97-1449, 1997 U.S. App. LEXIS 30497, at *1, 3 (8th Cir. 1997) (Just Compensation claims not barred by *Rooker-Feldman* doctrine).

Columbia Court of Appeals' denial of their petitions for waiver, the District Court lacked subject matter jurisdiction over their complaints.").

Accordingly, this Court should grant review to examine whether the promise of the Fifth Amendment, which *Williamson County* purported to preserve, can in fact survive the salutary requirements of issue preclusion and *Rooker-Feldman* which have, in the vast majority of cases, kept Just Compensation cases out of federal court entirely.

III. The Rule of *Williamson County* Appears to Relegate the Just Compensation Clause to the Status of a "Poor Relation" of Other Constitutional Guarantees

One member of Congress[4] observed that:

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[4] Members of Congress have deemed the burden imposed by *Williamson County* sufficiently unique and significant to warrant proposing legislation on several occasions. *See, e.g.*, Citizens Access to Justice Act of 1999, S. 1028, 106th Cong. (1999); Property Rights Implementation Act of 1998, S. 2271, 105th Cong. (1998); Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong. (1997). These bills would all have provided that "a final decision shall not require the party seeking redress to exhaust judicial remedies provided by any State or territory of the United States" in the takings context. *See, e.g.*, S. 1028 § 6(c); S. 2271 § 6(c) H.R. 1534 § 6(c).

Empirical and anecdotal evidence bears out the weight of the procedural burdens that Just Compensation litigants face in gaining access to federal courts. A study of all Just Compensation claims litigated in federal courts between 1983 and 1988 showed that federal judges avoided reaching a decision on the merits on ripeness grounds ninety-four percent of the time. *See* Gregory Overstreet, *The Ripeness Doctrine of The Takings Clause: A Survey Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions*, 10 J. LAND USE &

> Federal environmental laws are readily enforced in federal courts. First Amendment claims against local governments also have no trouble getting heard in federal court. Only private property rights are routinely dismissed or delayed.

143 CONG. REC. S12,482 (daily ed. Nov. 10, 1997) (remarks of Sen. Gorton). Requiring property owners to surmount the obstacle of costly and time-consuming state court litigation presents the risk that the Fifth Amendment, "as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment," will be treated like a "poor relation" among constitutional guarantees in federal courts. *See Dolan v. City of Tigard,* 512 U.S. at 392.

An instructive example (unfortunately all too typical), of the unique procedural obstacles that *Williamson County* erects for Just Compensation claimants is that of Richard and Ann Reahard. *See Reahard v. Lee County,* 30 F.3d 1412

ENVTL. L. 91, 92 n.3 (1994). A later study revealed that more than eighty percent of Just Compensation claims originating in federal district courts between 1990 and 1997 were dismissed on ripeness grounds before the merits were reached. *See* S. REP. NO. 105-242, at 8 (1998) (citing study conducted by the law firm of Lochnes and Blocher LLP). These dismissals functioned as complete termination of many of these cases

(11th Cir. 1994), *cert. denied*, 514 U.S. 1064 (1995). The county declared the Reahards' property a "resource protection area" in 1984, reducing the land's value by 96 percent. The Reahards spent five years thereafter unsuccessfully pursuing administrative remedies under the first prong of *Williamson County*. In 1989, they brought a compensation claim in state court, but county attorneys removed the case to federal district court. The federal court held the case ripe and awarded the Reahards $700,000 in just compensation, and the county appealed. *See Reahard v. Lee County*, No. 89-227-CIV-FTM-10C (M.D. Fla. 1991). The Eleventh Circuit Court of Appeals reversed the award and ordered the district court to review its ripeness holding. *See Reahard v. Lee County*, 978 F.2d 1212 (11th Cir. 1992). The district court again held the case ripe and reinstated the award of $700,000 in just compensation. *See Reahard v. Lee County*, No. 89-227-CIV-FTM-10C (M.D. Fla. 1994). On

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because the property owners could not afford to appeal or continue the litigation. *See id.*

appeal from this second judgment, ten years after the county had taken the Reahards' property, the Eleventh Circuit Court of Appeals, sua sponte, held that the case should, under *Williamson County*, have been tried in state court after all. *See Reahard*, 30 F.3d 1412, 1418 (11th Cir. 1994). Thus, five years after they had first filed in state court, and ten years after their property had been taken without payment of just compensation, the rule of *Williamson County* required the Reahards to begin all over again with a fresh state court suit.

Other constitutional violations are (as they should be) remediable by suit in federal court. Although one could concoct a "*Williamson County*" rule for violations of other provisions of the Bill of Rights, no one has seriously suggested that freedom of speech or assembly have not been denied under the federal Constitution until a litigant has sought and been denied relief in state court. Certainly state courts routinely provide remedies for violations of both state and federal constitutional rights, *see, e.g.*, Michael E. Solimine, *Supreme Court Monitoring of State Courts in the*

Twenty-first Century, 35 IND. L. REV. 335, 337 (2002), and suits under 42 U.S.C. § 1983 are cognizable in both state and federal courts, *see, e.g., Howlett v. Rose*, 496 U.S. 356 (1990) (holding that state courts of general jurisdiction must hear section 1983 claims); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (affirming state court adjudication of section 1983 claim).

This Court should grant certiorari to examine whether the *Williamson County* doctrine conflicts with the principle that the Just Compensation Clause of the Fifth Amendment, "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation" in terms of federal court access. *See Dolan*, 512 U.S. at 392.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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